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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/539,445

06/20/2005

Yoshinori Komatsu

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03/04/2009

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EXAMINER

O HERN, BRENT T

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

03/04/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

<p align="center">Advisory Action Before the Filing of an Appeal Brief</p>	<p>Application No. 10/539,445</p>	<p>Applicant(s) KOMATSU ET AL.</p>	
	<p>Examiner Brent T. O'Hern</p>	<p>Art Unit 1794</p>	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 17 February 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 4 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☒ Applicant's reply has overcome the following rejection(s): all 35 USC 112 rejections.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 1-8.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☒ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☒ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). filed 11/6/2008
13. ☐ Other: _____.

/BTO/
Brent T. O'Hern
Examiner, Art Unit: 1794

/Elizabeth M. Cole/
Primary Examiner, Art Unit 1794

Continuation of 11. does NOT place the application in condition for allowance because:

In response to Applicant's arguments (See p. 5, para. 2 of Applicant's Paper filed 2/17/2009.) that since crystallized fat is not necessary for its invention and Castenmiller ('626) discloses using crystallized fat and the amount of emulsifier employed by Castenmiller ('626) would not result in the claimed invention, it is firstly noted that Applicant's claims do not exclude the presence of crystallized fat or set forth any limits on the amount of emulsifier. Applicant does not set forth any evidence that its' composition does not include crystallized fat. It is known in the art that triglycerides are the primary type of molecules found in oils and fats and the most common type of triglycerides have fatty acid chains of 18 or 16 carbons with 18 carbons being the most common with these chains having from zero to three carbon-carbon double bonds per chain. It is known in the art that the triglycerides typically found in liquid vegetable oil and fat that has been made from vegetable oil typically has nearly the same triglycerides. Vegetable and animal fats are also similar. However, fat has a greater proportion of saturated chains such as stearic acid, C18:0, as opposed to unsaturated chains such as C18:3, C18:2 and C18:1. It is known that all triglycerides do not have the same fatty acid on all chains and all chains are not the same within an oil or fat. Thus, oil compositions typically have fat molecules and fat compositions have oil molecules. Furthermore, when oil is cooled it is known that crystals typically form from the molecules that have fewer double bonds. Applicant does not set forth in its claims a fatty acid profile, a solid fat index or temperature limitations for its claims. Thus, Applicant's arguments that its' invention does not need crystallized fats is not supported by evidence.

In response to Applicant's arguments (See p. 5, paras. 3-5 of Applicant's Paper filed 2/17/2009.) that one would not add propellant to Castenmiller's ('626) product because its composition already has bubbles and material with a propellant can not be held in a container, it is noted that gases serve two different purposes. The first is to make the composition light, fluffy and easy to spread while the second purpose is to make the material dischargeable from a container. If one were to spoon a creamy material with bubbles into a canister the bubbles within the material would not make the material sprayable but rather a propellant needs to be added so the material can be discharged in a desirable manner. Regarding holding the material in the container, it is noted that pressurized material is commonly held in containers by valves.

In response to Applicant's arguments (See p. 6, para. 1 of Applicant's Paper filed 2/17/2009.) that Clapp ('876) does not teach discharging a composition in a foam and Clapp ('876) would not have taught away from including a hydrocarbon propellant, it is firstly noted that Clapp ('876) is not cited for teaching discharging a composition in a foam but rather dissolving propellants into a foamable spread. Regarding, Applicant's conclusion that Clapp ('876) would not have taught away from including a pressurized hydrocarbon, it is noted that Applicant statement is confusing and possibly contains typographical errors. Furthermore, the Examiner does not suggest modifying Clapp ('876) by Castenmiller ('626) but modifying Castenmiller ('626) by Clapp ('876).

In response to Applicant's arguments (See p. 6, para. 1 of Applicant's Paper filed 2/17/2009.) that since Sejam ('580) teaches a non-aqueous butter and non-emulsified foams then one would not have been motivated to combine Sejam ('580) with Castenmiller ('626), it is noted that Sejam ('580) is cited for teaching foamable spreads can be placed in dischargeable containers with propellants and the precise composition is not an issue but rather the type of dispenser that is used for discharging this type of material.

In response to Applicant's arguments (See p. 6, para. 2 to p. 7, para. 1 of Applicant's Paper filed 2/17/2009.) Sejam ('580) teaches a solid fat index at 70 oF and does not teach using an emulsifier, it is firstly noted that Applicant's argument are not commensurate in scope with the claims as the claims do not specify a particular solid fat index. As discussed above Sejam ('580) is not cited for the composition without an emulsifier.

/BTO/
Brent T. O'Hern
Examiner, Art Unit: 1794